JD–104–98
Huntington, WV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MASTER MECHANICAL INSULATION, INC.

and Case 9–CA–32488

RONNIE LYNN KINCAID, An Individual

Mark Mehas, Esq., for the General Counsel.
Fred Holroyd (Holroyd, Yost & Evans), of
Charleston, WV, for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

Earl E. Shamwell, Jr., Administrative Law Judge. This case was tried in Huntington, West Virginia, based on a backpay specification and notice of hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs of the parties, I would find and conclude as follows:

The proceeding is based on backpay specification dated June 5, 1997, which followed a previous Decision and Order issued by the National Labor Relations Board (the Board) at 320 NLRB 1134 (1996). There, the Board determined that Master Mechanical Insulation, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discriminatorily laying off employee Ronnie Lynn Kincaid on July 14, 1994, and ordered the Respondent to offer him reinstatement to his former job and otherwise to make him whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings (herein backpay), plus interest.

The Board also determined that the Respondent did not violate the Act by refusing to rehire Kincaid when he was referred from his Union's hiring hall on July 18, 1994. Because of the importance of this finding to the disposition of the backpay issue, I deem it necessary to include the following quote from the Board's decision in pertinent part.

> We emphasize that our reversal of the judge on this [the above] issue does not affect the make whole remedy for Respondent's unlawful layoff of Kincaid . . . .
>
> Thus, not withstanding our finding that the Respondent did not unlawfully refuse Kincaid's referral for the project on that day, that job, as well as others that the Respondent was in the process of working and those secured after his layoff, may be considered in compliance proceedings. (Emphasis added.)

Thus, for purposes of determining what backpay Kincaid may be entitled, clearly and unambiguously, the Board decision envisions a consideration of any and all jobs for which

Kincaid could be eligible and qualified during the applicable backpay period which, of necessity, considering the Board's ruling, extends past July 18.[1]

I. Legal Principles Applicable to Backpay Proceedings

The Board has established well-settled principles governing the resolution of backpay disputes through its own and court proceedings.

Generally, where an unfair labor practice has been found, some backpay is presumptively owed by the offending employer in a backpay proceeding. *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995).

The General Counsel's burden is to demonstrate the gross amount of backpay due, that is, what amount the employee would have received but for the employer's illegal conduct. The General Counsel, in demonstrating gross amounts owed, need not show an exact amount; an approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35 (1992). Thus, it is well established that any formula which approximates what the discriminatee would have earned absent the discrimination is acceptable if it is not unreasonable or arbitrary under the circumstances. *Am Del Co., Inc.*, 234 NLRB 1040 (1978), *Frank Mascali Construction*, 289 NLRB 1155 (1988). The court and the Board have held that any doubts and uncertainties regarding the resolution of the backpay issue must be resolved in the favor of the discriminatee and against the wrongdoing employer. *United Aircraft Corp.*, 204 NLRB 1068 (1973). Once this has been established, the employer must then demonstrate facts that would mitigate the claimed backpay liability. The employer must, by a preponderance of the evidence, establish and clarify any such uncertainties. *Metcalf Excavating*, 282 NLRB 92 (1986).

The discriminatee is obliged to mitigate his backpay claim by searching for and/or obtaining interim employment and backpay will not run during periods when the employee willfully chose not to seek interim earnings. *American Bottling Co.*, 116 NLRB 1303 (1956).. While required to search for work, the discriminatee need not be successful but must make an honest, good-faith effort to find work. *Lloyd's Ornamental & Steel Fabricators*, 211 NLRB 217 (1974).

In order to show good-faith effort and avoid a finding that he incurred willful loss of earnings, the employee need not spend all of every day searching for employment or even search in each and every quarter of the backpay period. *Cornwell Co.*, 171 NLRB 342, 343 (1968). *Laidlaw Corp.*, 207 NLRB 591, 601 (1973), enfd. 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975). Therefore, the entire backpay period must be looked at to determine whether throughout the period there was, in light of all the circumstances, a reasonable continuing search such as to foreclose a finding of willful loss. *Cornwell Co.*, supra, at 343. As a practical matter, the employee must only make reasonable efforts to mitigate the loss of income and is not required to undertake the highest standard of diligence. *NLRB v. Ardueni Mfg. Co.*, 395 F.2d 420 (1st Cir. 1968); *NLRB v. Miami Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966).

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[1] In its brief, the Respondent contends that Kincaid's failure to report timely to the Respondent for work on July 18 tolled his backpay claim as of that date. Thus, the Respondent asserts, in effect, that the backpay period began on July 14 and ended on July 18, 1994. In light of the Board's decision allowing for consideration of the job for which he reported untimely on July 18 and all other jobs, the Respondent's position regarding the tolling of backpay as of July 18 must be rejected out of hand.

As the Board stated in *Lundy Packing Co.,* 286 NLRB 141 (1987):

> It is well settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard of diligence, i.e., he or she need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort. In determining the reasonableness of this effort, the discriminatee's skills, experience, qualifications, age, and labor conditions in the area are factors to be considered. The existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied. The respondent's obligation to satisfy its affirmative defense is to show a "clearly unjustifiable refusal to take desirable new employment." Uncertainty in such evidence is resolved against the respondent, as the wrongdoer. [286 NLRB at 142.]

The burden is on the employer to show that the discriminatee did not make reasonable efforts to find work. *Thalbo Corp.*, 323 NLRB No. 105 (April 30, 1997); and it does not meet its burden by merely presenting evidence of lack of success in obtaining interim employment or low interim earnings. *The Westin Hotel*, 267 NLRB 244 (1983).

Thus, the employer must affirmatively establish by a preponderance that the employee failed to make reasonable efforts to find interim employment. *December 12, Inc.*, 282 NLRB 475 (1986); *Big Three Industrial Gas*, 263 NLRB 1189 (1982).

The backpay period terminates or is tolled by a valid offer of reinstatement to a substantially equivalent position by the employer to the discriminatee. *Thalbo Corp.*, 323 NLRB No. 105 (April 30, 1997). "The offer of employment must be specific, unequivocal and unconditioned in order to toll backpay and satisfy the employer's remedial obligation." *Holo-Krome Co.*, 302 NLRB 452, 559 (1991).

Finally, the employer in a backpay proceeding may not re-litigate matters decided in the underlying unfair labor practice case. *Schorr Stern Food Corp.*, 248 NLRB 292 (1980).

II. The General Counsel's Compliance Specification[2]

The specification alleges that the backpay period commenced on Kincaid's date of unlawful layoff — July 14, 1994 — and that the Respondent made a valid offer of reinstatement to him, to which he did not respond or accept on October 14, 1996.

The specification sets forth a formula for computation of gross backpay due Kincaid, consisting of a projection of his weekly earnings, described as the average weekly hours worked by all "non core" asbestos abatement workers and those workers hired after Kincaid's layoff in each quarter of the backpay period, multiplied by the wage rate he would have received in each appropriate quarter of the backpay period as referenced by applicable collective-bargaining agreements between the Respondent and Kincaid's Union, Association of Heat and Frost Insulators and Asbestos Workers, Local Union 203 (the Union). It is undisputed

[2] The compliance specification is contained in G.C. Exhs. 1(c) and 2. G.C. Exh. 2 reflects an amendment of the overall specification by the General Counsel at the hearing and which resulted in only slight reductions in each category of the specification.

that pursuant to the pertinent collective-bargaining agreement, the Respondent would have made certain obligatory contributions on Kincaid's behalf. Accordingly, the specification includes certain projections of amounts due from the Respondent to various funds on Kincaid's account for each calendar quarterly; gross interim earnings — amounts Kincaid earned at various other employers — less allowable quarterly expenses (here, automobile mileage only) were determined by the Board's compliance officer to arrive at net interim earnings for each applicable quarter. A quarterly net backpay amount due Kincaid is calculated as the difference between calendar quarter gross backpay and calendar quarter net interim earnings. If net interim earnings exceed gross backpay in any given quarter, according to the specification, Kincaid is entitled to no backpay.

The Respondent, with one exception, does not dispute any of the above assertions and the general calculations set forth in the specification.[3] However, in its answer and brief, the Respondent has made a number of contentions in disagreement with the conclusions of the specification. The Respondent for one, as noted earlier, has disputed the termination date of Kincaid's backpay, arguing certain alternative dates terminating his backpay. The Respondent also contends that Kincaid was not diligent in seeking interim employment and therefore failed to mitigate his damages; and that the backpay amount was improperly allowed to accumulate because the Union did not properly refer Kincaid out for work. The Respondent further contends that the specification itself is inapplicable to the type of industry in which it engages. Finally, the Respondent contends that the very formula utilized by the Board is inappropriate and proposes its own alternative. The Respondent's formula, in essence, is based on the theory that a laid-off employee, such as Kincaid, in every case returns to the union hiring hall and is placed on its referral list awaiting a subsequent call from an employer. The Respondent attacks the reasonableness of the specification because the specification erroneously assumes that Kincaid would have been a full-time employee for the duration of the backpay period. According to the Respondent, Kincaid, as a non-core (temporary) employee, was not entitled to be retained by it. Nor could he expect to be automatically recalled if laid off.

The only issue before me is the amount of earnings and other benefits due Kincaid, the parties having waived all other issues by a properly executed stipulation.[4]

III. The General Counsel's Backpay Formula Rationale[5]

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[3] It is noted that the Respondent contests the inclusion of union dues in the specification, arguing that dues are deducted from the employees' wages and generally are forwarded to the Union by checkoff authorization. The applicable collective-bargaining agreements (G.C. Exhs. 12, 13, and 14) support the Respondent in this regard. Thus, Kincaid, if employed by the Respondent, would have been required to pay his dues and other assessments out of his wages; the Respondent was not obliged to contribute the dues amounts under the agreements in question. Kincaid testified that his Union, Local 203 (and 207), received 3 percent (60 cents per hour) of his wages through dues checkoff. Thus, I concur with the Respondent that the specification should not include dues in the amount of $1,989.97 and should be disallowed. I note that the General Counsel did not explain or justify the inclusion of dues in the specification.

[4] See stipulation between the parties, G.C. Exh. 1(b), dated September 10, 1996, by the Respondent and October 7, 1996, by the representatives of the Board.

[5] As stated earlier, the Respondent does not oppose the components of the backpay specifications (with the noted exception of the inclusion of dues therein). However, clearly it disputes the formula employed by the General Counsel. Thus, as opposed to any serious dispute with the figures contained in the specifications, the Respondent questions the rationale undergirding them. A discussion of the rationale follows hereinabove.

The General Counsel called Dave Morgan, a field examiner employed by the Board to handle compliance matters, as one of its principal witnesses.[6]

Morgan prepared the backpay specifications (as amended) for Kincaid. In arriving at the specifications, Morgan considered the Board's findings and the Order as a whole, as well as the prior Administrative Law Judge's decision. He considered Kincaid's background and employment characteristics and determined that Kincaid was a qualified journeyman licensed asbestos worker (insulation remover) who had been offered a supervisor's position at one time by the Respondent. Morgan examined the pertinent collective-bargaining agreements (CBAs) between it and Local 203 (later 207), regarding hiring procedures applicable to the backpay period. Additionally, the Respondent's payroll and pension fund records were analyzed by Morgan. Based on his investigation of these sources and after consultation with the Respondent's representatives and analysis of it pertinent records, he prepared the specifications which were approved by his superiors in the Region.

Morgan also considered the Respondent's alternative backpay formula/proposal as set forth in its answer to compliance specification (answer) and determined that the Board's formula and specifications were a more reasonable and appropriate approach to determining Kincaid's backpay entitlement.

First, as to the Respondent's claim that the CBAs required it to obtain all of its employees through the Union's referral (hiring hall) system, he determined that this was not the Respondent's exclusive method of securing employees. Under the pertinent CBAs, the Respondent had recall rights (up to 90 days) that allowed it to bypass the hiring hall altogether with regard to previously employed individuals. Moreover, in its Order, the Board determined that the Respondent routinely transferred or assigned both core and non-core employees to different jobs as the need arose.[7]

Morgan's second problem with the Respondent's formula lay in its use of two non-core employees — Sherman Bartram and William Rogers[8] — as representative employees for purpose of determining Kincaid's gross backpay.

Morgan determined that Bartram was not an insulation removal worker but was carried by the Respondent as a laborer in its records.[9] The Respondent's records provided in the

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[6] The Respondent's counsel stipulated and agreed to Morgan's expertise in compliance matters which includes obtaining compliance with administrative law judge decisions, Board Orders, court orders, and calculating backpay. Morgan has been employed by the Board for 15 years and has performed compliance work for 7-1/2 of those years. I would find and conclude that Morgan possesses an expertise in compliance matters in Board-related proceedings.

[7] The Respondent's president, Burcham, confirmed this finding and testified that the Company transfers its non-core employees from one job to another frequently. (Tr. 169.)

[8] There was a mixup regarding Rogers' name. The Respondent's answer denominated him Roger Williams. However, realizing its mistake, it orally amended its answer to reflect his true name, William Rogers.

[9] On cross-examination, Morgan admitted that Kincaid was a member of both the Laborers and Asbestos Workers Unions. However, he did not take this into account in evaluating Kincaid's obligation to seek interim employment because he did not have access to the Laborers' referral records to determine whether he signed up for the Laborers' out-of-work list.

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original trial also indicated that laborers and asbestos workers were paid at different rates and performed different functions.[10] Therefore, Morgan concluded that it was inappropriate to include Bartram as a representative employee for purposes of determining Kincaid's backpay. Moreover, Morgan discovered that Bartram was not actually terminated because of lack of work based on seniority. Rather, the Respondent's record indicates that Bartram was released for misconduct.[11]

Since Morgan had eliminated Bartram as a representative employee, he was left with only Rogers to compare with Kincaid. Rogers was an asbestos worker like Kincaid; however, Rogers had never been offered a supervisor's position as had Kincaid. To Morgan, this was significant.[12] On bottom, Morgan determined that Kincaid's backpay entitlements should not be based solely on one (1) somewhat dissimilar asbestos workers in the construction industry.[13] Consequently, Morgan selected a group comprised solely of the Respondent's non-core employees identified at the original trial, as well as all employees hired after Kincaid was laid off and who performed work similar to Kincaid. Morgan then calculated from the Respondent's records their average weekly hours by quarter. Additionally, Morgan could not ascertain at the time the reasons for Rogers' layoff and, for this reason, he felt that Rogers was not sufficiently representative for a determination of Kincaid's backpay.[14]

Morgan also questioned the Respondent's claim that layoffs were determined by it based on seniority. Pursuant to his examination of pension records provided by the Respondent, Morgan determined that at least one non-core employee was hired after Kincaid

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As will be shown herein, Kincaid made himself available for work through the Laborer's hiring hall system during the backpay period.

[10] G.C. Exh. 3 indicates that laborers were paid $13.89 per hour and insulation removal workers were paid $9.35. According to Burcham, laborers like Bartram work on flat surfaces such as walls, ceilings, and floors; insulation removal workers such as Kincaid work on mechanical systems, piping and ducts, and insulated equipment. (Tr. 171.)

[11] Bartram testified in the General Counsel's rebuttal case. Bartram described himself as an asbestos abatement laborer and a member of Laborers Local 553. According to Bartram, the Respondent terminated him because he was suspected of theft of company property, a charge he denied. Although Bartram appeared to me to be under the influence of alcohol, his testimony is consistent with the records in evidence (see R. Exh. 7) dealing with his employment status. G.C. Exh. 4, received by Morgan the morning of the hearing, is Bartram's separation report and indicates that his discharge was for misconduct.

[12] It is here noteworthy that according to Burcham, supervisors, irrespective of core or non-core status, as a general proposition may have more employment opportunities with the Respondent than a nonsupervisory employee. (Tr. 191.)

[13] R. Exh. 7, Rogers' separation report, indicates that he was terminated because of "permanent lack of work." The Respondent routinely used this reason for its layoff so that the employees could obtain State unemployment benefits; temporary lack of work layoffs evidently would bar an application for these benefits.

[14] Morgan rejected the Board's replacement worker formula, considering it inappropriate for the construction industry. Morgan based his calculations on formula two of the Compliance Casehandling Manual, Sec. 10532.3, which is customarily used for jobs in the construction industry wherein hours fluctuate from week to week. In its brief, the Respondent mistakenly avers that Morgan improperly used a formula applicable to an industrial setting. Thus, the Respondent's argument that the General counsel's specification was based on employment in an industrial setting is not supported by the record evidence.

and was retained by the Respondent's long after Kincaid was laid off.[15] Thus, to Morgan, the Respondent's argument of a "first in first out" to the hiring hall policy was not supported by its own records.[16]

Morgan also did not consider Kincaid's failure to report to work in time for a work assignment on July 18, dispositive of the backpay issue, since the Board's Order clearly indicated that the ordered make-whole remedy was not affected by this lawful action and that for purposes of compliance, that job and others could be considered.

Regarding Kincaid's interim employment and his expenses for travel, Morgan, as is his established practice, relied on the information Kincaid supplied him.[17] However, he did not verify this information by checking Kincaid's tax return or W-2s, nor did he independently calculate Kincaid's mileage. Basically, Morgan asked Kincaid about his availability for work, his search efforts and the jobs he obtained in the interim and was satisfied that Kincaid was truthful and diligent and that at no time during the backpay period was he unavailable for work.

Turning to the backpay period, specifically the termination date, Morgan chose October 14, 1996, as the last date of the period. Although Kincaid had received two offers prior to that date, the circumstances made them of questionable validity. The first of the prior offers was received by Kincaid too late for him to respond; the second offer was received by Kincaid but when he arrived at the jobsite, there was no job available. The October 14, 1996, offer of reinstatement was timely received by Kincaid; however, Kincaid refused the job offer. Morgan considered this last offer a valid offer of reinstatement and framed the end of the backpay period based thereon.

[15] Morgan was referring to non-core employee, David Fritz, who according to R. Exh. 11 was hired on July 18, 1994, and was laid off on September 1995. I also note that this exhibit also indicates that another non-core employee, Kenneth Gardner, was hired on July 15, 1994, and was laid off on October 10, 1994.

[16] Interestingly, Respondent's president, Burcham, specifically denied that the Respondent maintained such a policy, thus confirming Morgan's analysis and conclusions regarding the role of seniority in the hiring and layoff of temporary employees..

[17] For instance, Kincaid supplied Morgan with a chart of his travel related expenses. See G.C. Exh. 5.

IV. The Respondent's Alternative Backpay Formula

As noted earlier, the Respondent does not generally dispute the General Counsel's backpay specifications. However, the Respondent contests what it views as the specification's principal underlying premise — that Kincaid would have been a full-time employee for the duration of the backpay period. Therefore, on this ground, it submits that the Board's proposed specifications should not be utilized in computing Kincaid's backpay amount. It proposes an alternative to the General Counsel's formula.

The Respondent contends that as a construction company, it relied on a group of core (permanent) employees supplemented by temporary (non-core) workers to carry out its operations. Non-core employees are secured by the Respondent pursuant to applicable collective-bargaining agreements through the Union's hiring hall. Under these agreements, non-core employees such as Kincaid are required to contact the Union and make known their availability for work and then be placed on the out-of-work list. As a signatory to the contract, the Respondent then contacts the Union and requests the type and number of employees needed. These temporary employees are then referred from the hiring hall for the duration of a particular job and, on completion of the job, must return to the Union for additional referral. According to the Respondent, when Kincaid failed to report for work on July 18 at the appointed time and was rejected for employment, his backpay entitlements ended on that date.

The Respondent argues further in the alternative, that under this system, Kincaid (compared with other non-core employees hired approximately when he was hired and laid off after him) would have been in the normal course, based on seniority, laid off on July 25 or 26, 1994, at the latest. Accordingly, any backpay to which Kincaid may be deemed entitled should encompass this limited backpay period.

The Respondent called two witnesses in support of its position — Union Organizer Charles Hill and Thomas Burcham, its president.

Hill testified, among other things, about the hiring hall procedures under pertinent CBAs between the Union and the Respondent. Hill acknowledged the Respondent's practice of retaining its own "crew" (core workers), saying that "if you've got good workers [you] keep them." According to Hill, the 1994 CBA between the Respondent and the Union permitted the employer to recall any employee previously employed within the past 3 months.[18] Under the collective-bargaining agreement for the period August 12, 1996, through May 31, 1999, the hiring procedures were modified to give the Respondent the right to recall any employee previously employed without regard to time limitations and allowed journeymen union members to seek employment with signatory employees by direct solicitation, bypassing the hiring hall altogether.[19]

According to Burcham, the Respondent maintains a core group of employees numbering about 15-20, who have been with the Company for a long time and have received

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[18] See G.C. Exhibit 13. The agreement was effective August 1, 1994, through May 31, 1996. The agreement between the Respondent and the Union covering the period August 16, 1991, to approximately August 1, 1994, contained similar language permitting the 90-day employer recall right.

[19] See G.C. Exh. 12, Art. V. Kincaid was a journeyman asbestos worker — an "A" category worker under the contract. These provisions applied to him.

company-sponsored training; possess licenses in certain States, or have supervisory experience. The Respondent attempts to keep core employees continuously employed to avoid their retraining or relicensing; core employees are rarely laid off. Non-core employees by contrast are routinely laid off to reduce the work force when work is not available.

The Respondent has a national maintenance agreement with the Laborers' Union and a local contract with the Asbestos Workers Union. When it needs men to fill jobs, the Respondent submits a manpower order form which states the number and type of worker(s) needed.[20] When the non-core workers' services are no longer needed, they are laid off and the Respondent notifies the Union of the action so that the workers can get work with other contractors.[21]

The decision to lay off employees is made by the jobsite foreman who, as a matter of practice, merely informs management so that the employee is properly cashiered out and the appropriate paperwork is completed;[22] management generally does not question the job foreman's decision. According to Burcham, employee seniority — reckoned by the date on which an employee is referred to a job — generally does not play a role in the layoff decision. In fact, Burcham testified that seniority generally does not play a role in the construction industry for purposes of hiring, layoffs, or promotions (to supervisor).[23]

Regarding hiring, the Respondent generally hires all of its non-core employees out of the hiring hall, and Burcham could not recall a single time in the last several years when the Respondent had no non-core employees on its payroll. Burcham acknowledged that under the agreements with the Union, the Respondent could recall a worker within 90 days without going to the union hall. After 1996, employees (like Kincaid) could solicit work on their own and, in likewise, the Respondent could contact them directly.

Burcham acknowledged that on occasion, the Respondent did recall employees under the 90-day recall right, especially when it needed a worker with a specific license. In such a case, the Respondent would recall the employee and bypass the union hall out of concern that the Union might send an employee without the correct license.

According to Burcham, had not Kincaid been terminated on July 14, he could have been the next man laid off on July 25 or 26. However, Burcham further testified:

> [W]e have no formal system that dictates when a person is laid off based on

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[20] See R. Exh. 1 — a manpower order from dated 6-29-94 for five insulation strippers. Kincaid was hired pursuant to this order form.

[21] According to Hill, it is the worker's responsibility, however, to contact the Union regarding his availability for work.

[22] R. Exh. 3 is a typical separation report prepared for terminated employees. This particular report was for Kincaid.

[23] During Burcham's testimony, I interposed questions specifically relating to the seniority claim on the second page of Respondent's answer. Burcham testified that where the answer states that those employees are laid off and sent back to the hiring hall based on seniority, that this is not the case. Burcham clearly indicated that the Respondent does not have a first-in and first-out rule and that the Respondent does not lay off necessarily in the exact sequence of the way it hires. Moreover, the Respondent does not maintain any seniority records or listings so as to be able to lay off in the same sequence the Respondent hired. (Tr. 194-195.) On balance, Burcham ultimately testified that seniority is not a factor in layoffs or rehires.

> when they [sic] came in. Everything is dictated by the jobsite that they are referred to. If that job lasts a day, they may be referred for a day, work a day, and be laid off for a day . . . . There's no correlation between what day they're hired and what day they're laid off. [Tr. 195-196.][24]

Respondent's argument in support of its alternative approach to Kincaid's backpay entitlements rests on two basic predicates. One is that the General Counsel's approach is improperly based on an industrial as opposed to construction setting. This is clearly erroneous as I have indicated that the compliance officer utilized a construction industry formula to calculate Kincaid's backpay. Second is the Respondent's stated position that it is obligated to obtain all of its employees through the Union's hiring hall referral system. Here again, the Respondent advocates on a premise not supported by the evidence.

Based on the testimony of both the union representative and the Respondent's president, the Respondent does not exclusively obtain its temporary employees by and through the union hiring hall; nor is it required to by the union contracts. The CBAs provide alternative procedures for employing temporary workers which allow a complete bypass of the hiring hall. Additionally, the Respondent's president acknowledged that in practice, the Respondent does not always use hiring hall referrals to meet its manpower needs. Thus, contrary to the Respondent's position, the Union cannot be held responsible for failure to refer Kincaid out.

Regarding the Respondent's argument that Kincaid would have been laid off in late July based on seniority, both the documentary evidence and the testimony of the Respondent's president vitiates this position — seniority is and was simply not a factor in layoffs or hiring. Moreover, I am not convinced that the Respondent would have actually laid Kincaid off when Rogers and Bartram were laid off on July 25 and 26, respectively. The Respondent held Kincaid in high regard before his discharge and attempted as a general practice to keep good workers. In my view, Kincaid was considered to be such a good worker by the Respondent. Therefore, it cannot be gainsaid to a certainty that he would have been laid off on July 25 or 26, seniority notwithstanding. On this record as a whole, it seems to me that the Respondent's assertion that Kincaid would have been laid off on July 25 or 26 is not supported by the record and is at best an uncertain projection of what his employment status would have been had he not have been discharged.

In short, in my view, the Respondent's alternative approach is highly deficient, factually and logically, and certainly does not result in a more accurate measure of Kincaid's gross backpay entitlements. Accordingly, I shall use the gross backpay formula described in the specification. I would conclude, based on the specification, that the amount of backpay owed Kincaid by the Respondent is the specification amount of $38,494.44.[25]

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[24] The Respondent introduced Exh. 11 purporting to be a list of non-core employees hired by it for the period January 12 through July 18, 1994, and the layoff date for each person; Kincaid is included in the list. Burcham's answer to the hypothetical question regarding Kincaid's possible layoff on July 25 or 26 was based on this document.

It should be noted that the parties stipulated and agreed on the record, with regard to the employees listed in Exh. 11, that where a layoff date is attributed to each employee, the employee may in fact have been employed after that layoff date. And then, subsequent employment after that layoff date may have been as the result of being referred out from the hall, being recalled by the employer pursuant to the collective-bargaining procedures, or being rehired by the employer. (Tr. 186-187.)

[25] This is the net backpay amount to which Kincaid is entitled. According to the

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V. Kincaid's Mitigation Efforts and Related Post-Discharge Activities

For purposes of this compliance proceeding, let us say that Kincaid began his employment as an asbestos abatement worker with the Respondent on June 30, 1994, and was illegally discharged on July 14, 1994. Kincaid was a qualified and experienced asbestos worker who had been offered a supervisor's job with the Respondent at one time, but had refused the position. Kincaid was therefore never considered a core employee and was always considered non-core or temporary. On July 18, 1994, in response to the Respondent's request for workers through the Union's hiring hall, Kincaid reported as a referral. However, Kincaid was lawfully not hired because he reported for work after the Respondent had manned the job in question.

Kincaid testified at the hearing regarding, among other matters, his efforts to obtain employment after July 18, 1994. According to Kincaid, the specification in Appendix A accurately sets out his interim employment during the period covering the backpay period of July 14, 1994, through October 14, 1996. Kincaid testified that he was a member of two unions — the Laborers and Asbestos Workers — and during the backpay period, maintained contact with hiring halls of both so as to be placed on their out-of-work lists and to check on the availability of work. Kincaid never turned down a referral from these Unions unless he was already working.[26] Moreover, he only quit one job to take a better paying job at one of his listed interim employers.[27]

Regarding his expenses, Kincaid only claimed amounts related to his traveling to various interim employers during the backpay period. Toward that end, he prepared for Morgan a schedule of his travel to and from these employers, including date, number of trips, total mileage, and mileage differentials; his travel expenses were based on rates allowable by the Internal Revenue Service.[28] He faxed these records to the Board to be included in the backpay specifications. Kincaid's methodology and calculations for his mileage expenses are not disputed by the Respondent. I would find that Kincaid's approach seemed sound, reasonable, and rational; therefore, this matter need not be elaborated on further.

Kincaid impressed me as a highly credible and sincere witness. He was in command of the facts supporting his claim and offered reasonable and intelligent bases for claims — for example, his mileage expenses. Notably, Kincaid's expenses were quite reasonable and evidenced a certain restraint. In fact, he did not claim as expenses items that he might well have such as the costs of his long distance telephone calls to the Union for work. Kincaid

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specification, the gross amount is $48,385.53. The amount of $1,992.37(dues) has been deducted from the net total in question.

[26] Kincaid obtained letters from Laborers Local 1149 and Laborers Local 809 which attest to referrals made by each of Kincaid and state that he never refused a referral through them. (G.C. Exhs. 10 and 11, respectively.) See also G.C. Exh. 15. Kincaid produced records that he made, and/or kept, and/or maintained of his contacts with his Unions; these include handwritten notes as well as copies of telephone bills which, according to Kincaid, reflect over 120 calls to the Unions.

[27] Kincaid explained that he quit a job at Choice Co. for another at George Reintjes for higher wages, with no break in his work schedule.

[28] Kincaid's mileage expense schedule is contained in G.C. Exh. 5.

seemed to be serious and bona fide and answered all questions put to him either by the General Counsel or the Respondent's counsel in a confident and straightforward manner.

The Respondent suggests that Kincaid was not diligent in mitigating his claim and produced Hill to testify on this point. Hill testified that he was the custodian of records since May 1995 for Local 207 and the official responsible for the referral of employees to the various contractors; he maintained the out-of-work list for the Union. According to Hill, workers like Kincaid were responsible for calling in to the Local when out-of-work and placing themselves on the out-of-work list. Hill's practice, on assuming the Union's record-keeping function, was to document all such calls. Hill admitted that in 1995, the Union's records were not in good order and that the Local was not adequately staffed to keep completely accurate records. In 1996, Hill improved the system and was more careful about documenting the calls made to the Union. Hill testified that his records reflected that Kincaid refused a job in April 25, 1995.[29] Hill admitted that during the backpay period, Kincaid may have called in to check on job availability or to be returned to the out-of-work list, but he may have been on break or someone else took the call and did not record it.

While I believe that Hill testified to the best of his ability, I was more impressed with Kincaid. For instance, Kincaid made, kept, and produced complete records of his efforts to keep in touch with the Union; Hill's records, by contrast, were deficient by his own admission. All in all, I am satisfied that Kincaid more than satisfied his obligation to secure and retain interim employment. *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995).

Based on the foregoing, I would conclude that the Respondent has not met its burden of showing that Kincaid failed to make an adequate search for work.

VI. The Reinstatement Notice

Although the Respondent did not make an issue of the validity of the offer of reinstatement, some discussion of the matter is warranted.

Kincaid testified about the various notices he received from the Respondent.

By certified letter dated July 12, 1996, Kincaid was advised to report for work at the Respondent's Huntington, West Virginia office by 7:30 a.m. on July 16, 1996.[30] However, Kincaid did not receive the letter until around 11 a.m. on July 16. He then traveled to the Huntington office, arriving there around 2 p.m. that day, and was processed by the Respondent's clerical staff. However, he was advised that the job had been completed and there was no work. He was paid for 2 hours' showup pay.

Kincaid received a second notice of a job offer from the Respondent by letter dated July 31, 1996, informing him to report to the Respondent's Huntington office on August 5 at 7:30 a.m.[31] However, this letter was received by him a couple of days after August 5. Kincaid

[29] The year was not in Hill's ledger, but he believed it was 1995 because other subsequent entries were for that year.

[30] This letter is contained in G.C. Exh. 6; see also G.C. Exh. 7, a postal receipt indicating the July 16 delivery of this letter.

[31] This letter is contained in G.C. Exh. 8; this letter was mailed certified-return receipt. The return receipt was not produced.

telephoned Burcham but was put on hold for 5 minutes and never reached him to discuss the matter.[32] On about September 27, 1996, Kincaid received a third offer from the Respondent, instructing him to report to work on at 7:30 a.m. on October 14;[33] Kincaid elected to refuse the Respondent's offer, preferring instead to work for another company.

I would conclude that this third letter from he Respondent satisfies the Board's standards regarding valid offers of reinstatement and that the Respondent's obligation for backpay ended on October 14, 1996.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Master Mechanical Insulation, Inc., Huntington, West Virginia, its officers, agents, and representatives, shall make Ronnie Lynn Kincaid whole by paying him the amount of $38,494.44, plus interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State law.

Dated, Washington, D.C. June 23, 1998

Earl E. Shamwell, Jr.
Administrative Law Judge

[32] Kincaid talked to Morgan about this issue. One of his concerns was that on or about August 5, he was then working at one of his interim jobs and asked whether he should quit this job to respond to the job offer.

[33] G.C. Exh. 9.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.